In the Supreme Court

OF THE

United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 109

REDDING PINE MILLS, INC., a corporation, and ROBERT B. TOOLOOOD,

Petitioners,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, DIXWELL L. PIERCE, Secretary of the State Board of Equalization of the State of California, and RAYMOND R. SCHULZE,

Respondents.

PETITION FOR WRIT OF CERTIORARI

to the District Court of Appeal, State of California, Third Appellate District.

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Respondents.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal, State of California, Third Appellate District.

The Petitioners' Petition for Writ of Certiorari respectfully shows:

A. JUDGMENT SOUGHT TO BE REVIEWED AND REPORTS.

Petitioners hereby petition for a Writ of Certiorari for review of the decision of the District Court of Appeal, State of California, Third Appellate District,

reported in Volume 157, Advance California Appellate Reports, page 38, said case being 3 Civil No. 9439. The opinion of said court in said action is appended hereto. Petitioners petitioned for a hearing before the Supreme Court of the State of California, and the same was denied by said Supreme Court on March 19, 1958, by a four to three memorandum decision; the Chief Justice and Justices Traynor, Schenk and Spence voting against the petition, and Justices Carter, Schauer and McComb voting for the petition. Said memorandum decision is reported in 49 Advance California Reports, Volume 32, at page 3 of the Minutes therein.

B. JURISDICTION.

The jurisdiction of this Court is invoked on the ground that the state court rendering such decision has decided a federal question of substance not heretofore decided by this Court and has decided the same in a manner not in accord with applicable decisions of this Court.

1. Judgment and Entry Dates.

The judgment sought to be reviewed was originally entered January 21, 1958 and the final judgment of the court was handed down on March 19, 1958, and entered on March 25, 1958.

2. Rehearing and Extensions.

No petition or order respecting a rehearing or granting an extension of time within which to petition for certiorari has been granted.

3. Statutory Authority for Review.

The statutory provision under which jurisdiction of this Court is invoked is Title 28, Sec. 1257, U.S.C.A.

C. QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review by this Court are twofold:

(1) Whether the use by an administrative agency of a subpoena, for investigation purposes only, against a person not subject to regulation by such administrative agency, is a denial of due process of law and a denial of equal protection of the law; and therefore a violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

(2) Whether the failure of the administrative agency to define the nature and character of its investigation, by some form of resolution, pleading or other method of specifying an issue, with sufficient certainty to permit the subject of the investigation to know the nature and character of the investigation, and to be provided with the opportunity for a hearing upon such issue, is a denial of due process of law and a violation of the Fifth and Fourteenth amendments to the Constitution of the United States?

D. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The State Board of Equalization of the State of California has set forth the constitutional and statutory provisions upon which it relies in the subpoena. These in turn are set out in detail in Appendix "B". The Board has the power to assess for tax purposes the property of certain public utilities, and other specific owners of so-called "state assessed property". Petitioner corporation is admittedly not a "state assessed property" owner, but a "common property taxpayer" whose property is not subject to assessment by the Board; being assessed for tax purposes only by the County Assessors of the respective counties of the State of California. In exercising the power of subpoena for an investigation for the production of books, records and documents of petitioner corporation, and making it the sole subject of inquiry, and the production and examination of its books and records, the end of the inquiry; rather than issuing the subpoena to produce them in an "investigative" or "adjudicative" hearing, in which the object of the investigation was an object of regulation by the administrative agency, and such regulation was the end of the investigation; the Petitioner contends that the State Board of Equalization of the State of California has exceeded its constitutional powers and therefore denied equal protection and due process of law within the meaning of the constitutional provisions governing the same.

E. STATEMENT OF THE CASE.

This case raises the question of the extent to which an administrative agency can use the power of subpoena for investigation. The subpoena was issued by the State Board of Equalization and reads as follows:

"Before the State Board of Equalization of the State of California

In the Matter of Redding Pine Mills, Inc., a corporation, and the Appraisal of Certain of its Properties for Intercounty Equalization Purposes (Section 9, Article XIII, California Constitution; Section 1831, Revenue and Taxation Code; Statutes 1955, Chapter 256; Section 15611 of the Government Code)

SUBPOENA DUCES TECUM

(Government Code Section 15613)

The People of the State of California send greeting to

Robert B. Toogood, Secretary of Redding Pine Mills, Inc., a corporation.

We command you, and all and singular business and excuses being set aside, you appear and attend before the State Board of Equalization of the State of California, and Raymond R. Schulze its duly appointed representative, at 1800 Shasta Street, Redding, Shasta County, California, on the 4th day of April, 1957, at 10:00 o'clock A.M.

of said day, then and there to give evidence in the above-mentioned proceeding now pending before said Board, and to bring with you and there produce the following documents material to said proceeding and which are now in your custody or under your control, to wit:

1. The general ledger, property ledger, and other books of account of Redding Pine Mills, Inc., a corporation, recording historical cost data for buildings and structures, machinery and equipment of the lumber mill of said corporation located near Anderson, Shasta County, California, on 55.32 acres in Section 30, T. 30 N., R. 3 W., identified as Shasta County Assessor's Parcel 1-51-03 and Tax Code Area 52-09, for all years from the date of installation or acquisition of said mill by said corporation to and including 1956.

2. The inventory records for 1956 of said corporation as contained in its general ledger, other books of account and supporting records, and the record of said corporation of its most recent physical inventory taken prior to March 5, 1956. 'Inventory' as used herein means merchandise, materials, work in process, finished products, and supplies for the lumber mill of said corporation referred to in Item 1 above.

Disobedience of this subpoena may be punished as a contempt by a court of competent jurisdiction by a fine not exceeding five hundred dollars ($500.00) or by imprisonment in the county jail not exceeding five days, or by both such fine and imprisonment. Every person served with a subpoena issued by the State Board of Equalization who fails or neglects without just excuse to obey

it also may forfeit to the State of California the sum of five hundred dollars ($500.00) to be recovered by action in the name of said board.

Given under my hand this 18th day of March, 1957.

(Seal) Dixwell L. Pierce,
Secretary, State Board
of Equalization."

On March 28, 1957, plaintiffs filed the petition and complaint which is the basis of the action in question. There was issued, on March 29, 1957, an order to show cause and temporary restraining order pursuant to the verified complaint for declaratory relief. On April 3, 1957, the State Board of Equalization served and filed its return and answer, and the matter was set for hearing by stipulation on the merits.

The following facts were stipulated:

Plaintiff is an Oregon corporation entitled to do business under the laws of California. Plaintiff Toogood was the secretary of the corporation and was served with the subpoena hereinabove set forth. Redding Pine Mills, Inc. is a "common property taxpayer" and not the owner of any "state assessed property" subject to assessment by the Board of Equalization. The subpoena in question was served and a demand for withdrawal was made upon the secretary of the Board, Mr. Schulze, the Board's representative named in the subpoena, and the Board itself. Raymond R. Schulze is an appraiser employed by the Board of Equalization for the purpose of appraising property. The subpoena was issued by the

Board in the exercise of its "investigative" functions, as distinguished from its "adjudicative" functions.

The defendant Schulze had been assigned by Mr. Keith, Chief of the Division of Assessment Standards of the Board, to make the appraisal of certain selected samples of properties. Schulze was employed strictly in the inter-county equalization phase of the Board's work and not in the assessment "of state assessed property." No annual survey in Shasta County had been made or completed by the Board for the purpose of inter-county equalization pursuant to the authority of Section 1831 of the Revenue and Taxation Code of the State of California. No notice of the completion of any survey had been given to the County of Shasta, and no demand had been made for a hearing by the County of Shasta, pursuant to the provisions of Section 1834 of the Revenue and Taxation Code.

F. STAGE AT WHICH GROUNDS RAISED.

Petitioners raised the Federal questions involved in their initial pleading. In Paragraphs VII and IX of their alternative petition for writ of mandate they allege that the Board's investigation was being conducted under a misconception of the Board's constitutional authority and in excess thereof. Petitioners, in their complaint for declaratory relief, repeat these allegations, and also allege that controversy exists concerning the constitutional authority of the Board.

It was strenuously urged in argument before the trial court and in the briefs, argument and petitions to the appellate courts that the Board used an unconstitutional method to carry out its intercounty equalization function, namely, designating Petitioner, Redding Pine Mills, Inc., as the subject of an investigation.

The trial and appellate courts considered and held that there was no violation of due process involved in the Board's action. They failed, however, to pass directly upon the question of constitutional authority to compel the disclosures by the device of instituting an investigation of a taxpayer who, as a "common property taxpayer", is outside the scope of its regulatory power.

G. ARGUMENT.

1. EXCESS OF CONSTITUTIONAL POWER, ARBITRARY ADMINISTRATION AND DENIAL OF EQUAL PROTECTION.

Petitioner contends that by enlarging its inquiry powers to include within the scope thereof, persons not subject to regulation by the Board of Equalization, the Board's unequal administration of the statutes in question, has denied equal protection of the laws to the Petitioners.

A private corporation is "a person", and therefore entitled to equal protection of the laws under the Fourteenth Amendment. *Power Manufacturing Co. v. The Saunders,* 47 Supreme Court 678, 274 U.S. 490, 71 L.Ed. 1165.

The principle that equal protection of the laws can be denied by unequal administration has been well established by this Court, the first and leading case being the case of *Yick Wo v. Hopkins,* 118 U.S. 356, 6 Supreme Court 1064, 30 L.Ed. 220.

The position of Petitioners is that by the determination that the subpoena statute in question (Section 15613 of the Government Code of the State of California), included within it the power to issue subpoenas for "investigative" purposes and was not limited to the powers of the Board to hold hearings in "adjudicative" matters, that the statute, as now construed by the State courts, permits the employees of the Board of Equalization to investigate anyone they wish without regard to whether they are subject to the regulatory power of the Board or not.

The decisions of this Court have always held that administrative agencies must confine their direct power of investigation to persons subject to the regulation of the particular administrative agency in question. *Ellis v. Interstate Commerce Commission,* 237 U.S. 434, 59 L.Ed. 1036, and *Jones v. Securities & Exchange Comm.,* 298 U.S., page 1, 80 L.Ed. 1015.

Said the court in the *Ellis* case:

> "The Armour Car Lines not being subject to regulation by the Commission, its position was simply that of a witness interested in but a stranger to the inquiry, and the Commission could not enlarge its powers by making the company a party to the proceedings and serving it with notice.* * *"

The rule that is applicable here is well stated in 42 *Am. Jur.* 414, Section 86, as follows:

> "*Persons Subject to Investigation.*—The persons subject to investigation by an administrative agency will depend upon the statutory powers and purposes of the particular agency. A person who is not subject to regulation by a commission may not be subjected to a sweeping investigation into his affairs. He may be questioned only as a witness, even though the Commission made him a party to the proceeding.* * *"

The principle is further stated in a footnote as follows:

> "The Interstate Commerce Commission cannot enlarge its powers to compel testimony from a corporation which, not being subject to regulation by the Commission, is simply in the position of a witness interested in, but a stranger to, the inquiry, by making such corporation a party to the proceeding and serving it with notice.* * *"

The exact contention made by the Respondent Board was fully discussed and rejected in the *Jones* case. In this case, the petitioner had filed an application for registration with the Securities and Exchange Commission. Pursuant to the provisions of the Securities and Exchange Act, the Commission thereafter directed that stop order proceedings be instituted and required the registrant to appear and show cause why a stop order should not be issued suspending the effectiveness of his registration statement. The Petitioner then withdrew his registration application. It is to be noted that in that case the Petitioner, when

the application for registration was filed, temporarily subjected himself to regulation by the administrative body. In dismissing his application, the court held that he was not thereafter subject to regulation and was then placed in the position of being the subject of an inquisition or "fishing" expedition. Said the court:

> "An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. The citizen, when interrogated about his private affairs, has the right, before answering, to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer. Since here the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate when the registrant rightfully withdrew his statement, the power of the commission to proceed with the inquiry necessarily came to an end.* * *"

In support of this principle the court cited the *Ellis*, case, above quoted, and the court clearly decided that when the power of regulation over the subject by the administrative agency ceased, it could not then be made the subject of a sweeping inquiry, but thereafter could only be called as a witness in a proceeding in which he had, as the court stated, "a right, before answering, to know why the inquiry is made." The court further stated, at page 27, the principle that should govern in the instant case:

> "The philosophy that constitutional limitations and legal restraints upon official action may be

brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government. An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing to light. *Cf. Byars v. United States,* 273 U.S. 28, 29, 71 L.Ed. 520, 522, 47 S. Ct. 248, and cases cited. If the action here of the Commission be upheld, it follows that production and inspection may be enforced not only of books and private papers of the guilty, but those of the innocent as well, notwithstanding the proceeding for registration, so far as the power of the commission is concerned, has been brought to an end by the complete and legal withdrawal of the registration statement."

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2. DUE PROCESS OF LAW.

Direct authority in support of Petitioners' proposition is *Watkins v. United States,* 1 L.Ed. 2d 1273. The *Watkins* case is a case directly in point on the question of the sufficiency of the notice, with which a statement of the issues of an investigative proceeding should be made, in order to permit a person *who is subject to investigation* to determine the relevancy and admissibility of the questions put to him and the documents required to be produced. (In the instant case the taxpayer was not even subject to investigation.)

Watkins, who was a labor leader and who was under investigation as an alleged former Communist by the House Un-American Activities Committee, refused to answer various questions which had been put to him on the ground that they were impertinent and irrelevant. He was charged with contempt of Congress for failing to answer and was convicted. His conviction was reversed by this Court.

The case turned upon the proposition that such investigations should be based on a sufficiently definite formal declaration of the investigating body and an appropriate resolution that fully defined the area and limits of the investigation to enable a reasonable person to determine what was and what wasn't proper.

As was pointed out by the court the person subject to such an investigation is required to answer or not answer the questions at his peril or be subject to automatic contempt. The same is true in connection with the refusal to comply with the provisions of Section 15613 of the Government Code from which the subpoena power in this case is intended to be derived. (See Sec. 15614, California Government Code, Appendix B.) There is no provision in the statute in question here for a person to go into court as provided in Section 11510 of the Government Code (see Appendix B) to test the validity of the subpoena, but he must produce the books and records, or not produce them, at his peril. This point was the point upon which the *Watkins* case turned.

There is no dispute of the proposition of law that administrative investigations are an exercise of the

investigative power of the legislative authority, and, therefore, the same rules which limit the investigative powers of the legislative bodies, such as were laid down in the *Watkins* case, must of necessity apply to investigations conducted by administrative agencies. The most pertinent quotation from the *Watkins* case appears at page 1295 as follows:

> "It is obvious that a person compelled to make this choice is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense. The 'vice of vagueness' must be avoided here as in all other crimes. There are several sources that can outline the 'question under inquiry' in such a way that the rules against vagueness are satisfied. The authorizing resolution, the remarks of the chairman or members of the committee, or even the nature of the proceedings themselves might sometimes make the topic clear. This case demonstrates, however, that these sources often leave the matter in grave doubt."

H. CONCLUSION.

The chief argument advanced by the State against Petitioners' position is that the untrammeled use of the "investigative" subpoena is necessary in order for the Board to obtain information without which it cannot function.

The necessity to obtain information does not justify obtaining it by unlawful means. Both the trial court,

the District Court of Appeal and respondents have continually argued that Section 15613, which in no way grants any powers of investigation to the Board of Equalization itself, let alone any officers or employees, by implication contains the sweeping power of investigation contended for, because the Board must have information and the use of the investigative process is the only way in which it can be obtained. The argument, in effect, is that the end justifies the means.

As we have previously pointed out in the briefs, murder justifies the death penalty but doesn't justify shooting a murderer before a firing squad without a trial. For some reason both courts have ignored the basic argument presented by appellants to the effect that we do not dispute the right of the Board of Equalization to have appropriate information but we do dispute its right to the sweeping investigative power that it contends for. Petitioner insists that, if it seeks to conduct investigations, they must be conducted according to express statutory grant. If no such statutory grant is given the power does not exist.

To the extent that they have investigative powers we insist that they should be conducted in accordance with constitutional principles. If a hearing were being held pursuant to the Board's power to regulate the assessors of particular counties, who are the true subjects of regulation, in the exercise of the inter-county equalization power, and in the course of such a proceeding, particular "common property taxpayers"

were required to appear as witnesses and produce their books and records, to the extent that the same may shed light upon or bear upon the values of their properties, appellants would not argue with the Board's power to conduct such hearings. Nor would we argue with the Board's power to conduct any other hearings in which the assessors or "state assessed property" owners were being subjected to investigations in accordance with the Board's power to regulate them. Such is not the case here.

If this decision stands the Board of Equalization has been granted the power to clothe every employee of the Board, or any other "duly authorized representative" designated by the Board, with a weapon to roam at large through the State of California and conduct ex-parte proceedings which permit them to pry into the affairs of "every common property taxpayer" in the State of California, to-wit: every person in the State of California who owns any property. No limits are imposed upon this power; no rules are established as to the limitation on these employees to inquire into extraneous or irrelevant matters; no provision is made in the law for any taxpayer to question the materiality or relevancy of the information being sought or pried into; and the Board is not required under this decision to establish by resolution, by complaint, petition, or other initiatory instrument, any issues or statements of objectives which would enable the taxpayer to refuse, *except under pain of contempt,* to answer any question or produce any book, record or document which may be sought. Such police

state methods were not within the purview of the framers of the Constitution of the United States. We therefore request that this Honorable Court grant this petition.

Dated, Redding, California,
June 9, 1958.

Respectfully submitted,
CARR & KENNEDY,
LAURENCE J. KENNEDY,
Attorneys for Petitioners.

LAURENCE W. CARR,
Of Counsel.

(Appendices A and B Follow.)

Appendix A

(Vol. 157 A.C.A. 38.)

In the District Court of Appeal
State of California
Third Appellate District

3 Civil No. 9349

REDDING PINE MILLS, INC., a corporation, and ROBERT B. TOOGOOD,
Plaintiffs and Appellants,
vs.
STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, DIXWELL L. PIERCE, Secretary of the State Board of Equalization of the State of California, and RAYMOND R. SCHULZE,
Defendants and Respondents.

OPINION

This is an appeal from a judgment denying a petition for a writ of mandate sought to compel the State Board of Equalization to quash a subpoena duces tecum issued by its secretary. Declaratory relief was also denied in the same proceeding.

The appellant Redding Pine Mills, Inc., is an Oregon corporation qualified to do business in Cali-

fornia, and the appellant Robert B. Toogood is its secretary. On or about March 20, 1957, appellant Toogood, as secretary of Redding Pine Mills, Inc., was served with a subpoena duces tecum, which directed him to appear before one of the board's appraisers at the time and place designated therein and to produce the corporation's ledger and other books of account "recording historical cost data for buildings and structures, machinery and equipment of the lumber mill of said corporation . . . for all years from the date of installation or acquisition of said mill by said corporation to and including 1956," and "the inventory records for 1956 . . . and the record of said corporation of its most recent physical inventory taken prior to March 5, 1956," defining "inventory," as used therein, to mean "merchandise, materials, work in process, finished products, and supplies for the lumber mill. . . ."

The trial court found, among other things, that Redding Pine Mills, Inc., is a so-called "common property" taxpayer whose properties in Shasta County are subject to assessment by the assessor of that county and not by the State Board of Equalization.

The trial court also found that the State Board of Equalization was, at the time of the issuance of the subpoena, making a survey in 16 counties of the state, including Shasta County, and a statistical survey in each of the remaining counties of the state to determine the relationship between the total value of land, improvements and personal property entered upon

the local assessment roll by the county assessor and the total market value thereof to enable it to perform the duties required of it by section 9 of article XIII of the California Constitution.

Appellants contend that, since the corporation owns no property subject to assessment by the State Board of Equalization, it is not subject to regulation by the board and, therefore, the board exceeded the constitutional and statutory limits that are imposed upon the use of a subpoena in the absence of an issue followed by a hearing and an opportunity afforded them to have rulings that are subject to review on the materiality and admissibility of the demanded documents. On the other hand, respondents claim the right to inspect the subpoenaed documents in order to enable the board to perform the duties required of it by section 9 of article XIII of the California Constitution. That section of the California Constitution established the State Board of Equalization, and in part provides:

"A State Board of Equalization . . . shall be elected . . . whose duty it shall be to equalize the valuation of the taxable property in the several counties of the State for the purposes of taxation. . . . The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; provided, such State and county boards of equalization are hereby authorized and empowered, under such rules of notice as the county

boards may prescribe, as to the county assessments, and under such rules of notice as the state board may prescribe as to the action of the State board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll;'. . ."

To enable the board to perform the duties required of it by the above constitutional provision, the Legislature enacted section 1831 of the Revenue and Taxation Code which provides that:

". . . the board shall make a survey annually in each county to determine the relationship between the total value of land, improvements and tangible personal property entered upon the roll by the assessor, and the total market value thereof. As a basis for this determination, the board shall consider sales and other appraisal data compiled by appraisers competent to determine accurately the market value of the property. These data shall relate to representative samples of property subject to local assessment in each county sufficient in number and dispersion to assure an adequate cross-section of the taxable wealth within the county, both as to the classes of property enumerated and as to the location thereof."

It is obvious that, in order to perform these duties, it is essential that the board have access to many facts, often not voluntarily supplied by the taxpayer and we are convinced that the use of a subpoena, when

the facts are not voluntarily supplied, violates no constitutional provision of due process of law. Nothing in section 1831 of the Revenue and Taxation Code requires that a hearing be held at any particular stage of the investigation, nor can any order be made concerning the person whose property is being investigated. Such investigations concern a proper subject of inquiry since it seeks only information necessary and material to aid the board in carrying out the constitutional mandate. In so doing, the board does not exercise a quasi-judicial function. There is no need to observe the same procedural requirements in making investigation contemplated by the statute as are necessary in quasi-judicial proceedings. In 27 A.L.R.2d 1208, 1209, annotation, it is said:

". . . It is now well settled that, without violating constitutional provisions bearing upon separation and delegations of powers or due process, an administrative agency may be given and may exercise the power to require the attendance of witnesses in proceedings of a purely investigatory nature." (See cases cited.)

It has been so held even where the person subpoenaed was not subject to regulation. *(State ex rel. Railroad & Warehouse Com. v. Mees,* 235 Minn. 42 [49 N.W.2d 386, 27 A.L.R.2d 1197, 1206-1207].) In the *Mees* case the court said:

"Intervener suggests that the use of the subpoena power against persons not subject to the commission's regulation would be unconstitutional unless restricted to quasi-judicial proceedings. The exact basis for this suggestion is not made clear; however, we assume that

it is on the grounds that such a use would violate due process of law. At one time, it was seriously doubted that the subpoena power could ever validly be used in administrative proceedings not quasi-judicial in character.

"The case of *Harriman v. Interstate Commerce Com.*, 211 U.S. 407 [29 S.Ct. 115, 53 L.Ed. 253], cited by intervener, reflected that attitude in its holding that under the then existing terms of the interstate commerce act the interstate commerce commission had no power to employ compulsory process in an investigation whose subject could not have been made the object of a complaint. Indeed, a dictum in the case, 211 U.S. 418 [29 S.Ct. 117, 53 L.Ed. 262-263], went so far as to question the constitutionality of the grant of such a power. Since that time, in both state and federal government, the subpoena power has been granted and exercised for a wide variety of functions not quasi-judicial in nature. In the light of recent United States Supreme Court decisions, today there is little doubt as to the constitutionality of such practice, particularly where, as here, a business 'affected with a public interest' is the subject of the investigation. Nor do we think that a remnant of the former concept can be salvaged by contending that the witnesses in such investigations must be under the direct regulation of the agency conducting the investigation. So long as the investigation is for a lawfully authorized purpose and the information sought relevant and material to the investigation, we cannot see where due process is offended by requiring any person possessed

of that information to testify. . . . No rights of the parties are adjudicated. . . ."

Nor do we agree with appellants' contention that the board's statutory authorization to issue subpoenas as an implementation to its investigatory powers is restricted to a compelling of the production and examination of records of persons whose property is subject to assessment by it or who is required to report to it under the provisions of sections 15617 and 15618 of the Government Code. While the board derives its authority to issue subpoenas under these sections in an investigation of property, subject to assessment by it for taxation, it does not follow that the board does not have the power to issue subpoenas in an investigation relating to intercounty equalization. Section 9 of article XIII of the California Constitution, section 1831 of the Revenue and Taxation Code, and section 15611 of the Government Code are the substantive authority for such investigations. Under the provisions of section 15611 of the Government Code:

"Whenever the board deems it necessary, it may visit as a board or by its individual members, or may send its secretary or duly appointed representative to, the several counties and cities to inspect property, learn its value, and collect information to enable it to equalize assessments and levy the taxes as required by law."

Section 15613 of the Government Code provides that:

"The board may issue subpenas for the attendance of witnesses or the production of books, records, accounts, and papers before it, its secretary, any of its members, or any representative designated by it. Such subpenas shall be signed by a member of the board or its secretary, and may be served by any person."

It is our conclusion that under these sections the board was vested with the power to issue the subpoena duces tecum in question.

Nor is there any conflict between sections 15617 and 15618 of the Government Code and section 15613. Each of the sections is a part of the substantive provisions authorizing the use of a subpoena provided for in section 15613.

No further points require discussion.

The judgment is affirmed.

Warne, J. pro tem.

Van Dyke, P.J., and Peek, J., concurred.

Filed January 21, 1958.

L. A. Endres, Clerk.

Appendix B

I. CONSTITUTIONAL AND STATUTORY PROVISIONS MENTIONED IN SUBPOENA DUCES TECUM.

Section 9, Article XIII, California Constitution

"Sec. 9. A State Board of Equalization, consisting of one member from each congressional district in this State, as the same existed in 1879, shall be elected by the qualified electors of their respective districts, at the general election to be held in the year 1886, and at each gubernatorial election thereafter, whose term of office shall be for four years; whose duty it shall be to equalize the valuation of the taxable property in the several counties of the State for the purposes of taxation. The Controller of State shall be ex officio a member of the board. The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; provided, such state and county boards of equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe, as to the county assessments, and under such rules of notice as the state board may prescribe as to the action of the state board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll; provided, that no board of equalization shall

agency, upon affidavit of any party showing that the testimony of such witness is material and necessary, may indorse on the subpena an order requiring the attendance of such witness.

(c) All witnesses appearing pursuant to subpena, other than the parties or officers or employees of the State or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpena, except the parties, shall receive mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court. Witnesses appearing pursuant to subpena, except the parties, who attend hearings at points so far removed from their residences as to prohibit return thereto from day to day shall be entitled in addition to fees and mileage to a per diem compensation of $3 for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing. Fees, mileage and expenses of subsistence shall be paid by the party at whose request the witness is subpenaed."

Section 15613, Government Code.

"Subpenas; issuance, service.

The board may issue subpenas for the attendance of witnesses or the production of books, records, accounts and papers before it, its secretary, any of its members or any representative designated by it. Such subpenas shall be signed by a member of the board or its secretary and may be served by any person."

Section 15614, Government Code.

"Subpenas, noncompliance; refusal to answer; contempt.

Any person duly subpenaed who refuses or neglects to attend as a witness or to produce any books, records, accounts or papers in his possession, custody, or control in response to such subpena or who refuses to answer any question pertinent to the matter under investigation by the board put to him by any member of the board, its secretary, or designated representative, is guilty of contempt, and may be punished by a court of competent jurisdiction by a fine not exceeding five hundred dollars ($500), or by imprisonment in the county jail not exceeding five (5) days, or by both such fine and imprisonment."

III. OTHER PERTINENT STATUTORY PROVISIONS.

Section 15617, Government Code.

"Attendance before board, production of books and papers, testimony.

The board may require anybody having knowledge of the business of any person who is or whose property is subject to assessment by it, or having the custody of the books, accounts, and papers of such person, to attend before it, or any of its members, and bring with him for inspection any books, accounts, or papers, of such person in his possession and under his control, and to testify under oath touching any matter relating to the organization or business of such person."

Section 15618, Government Code.

"Examination of books and papers.

The board may examine, as a board, individually, or through its staff, the books, accounts, and papers of all persons required to report to it, or having knowledge of the affairs of those required so to report."

Section 1834, Revenue and Taxation Code.

"Assessment ratio; hearing; application.

If the county, through its assessor or board of supervisors, desires to be heard with respect to the assessment ratio based upon the survey, opportunity for such hearing shall be afforded by the board between the third Monday in July and the third Monday in August, upon application therefor in writing filed not later than the first Monday in August. The application shall specify in what respects the county believes that the determination of the relation between the assessed value and the market value of the property within the county is in error."

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1958

No. [redacted] 109

REDDING PINE MILLS, INC., a corporation, and ROBERT B. TOOGOOD,
Petitioners,
vs.
STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, DIXWELL L. PIERCE, Secretary of the State Board of Equalization of the State of California, and RAYMOND R. SCHULZE,
Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Third Appellate District

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 1075

REDDING PINE MILLS, INC., a corporation, and ROBERT B. TOOGOOD,
Petitioners,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, DIXWELL L. PIERCE, Secretary of the State Board of Equalization of the State of California, and RAYMOND R. SCHULZE,
Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Third Appellate District

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the District Court of Appeal (Appendix A of Petition) is reported at 157 Advance California Appellate Reports 38, 320 P. 2d 25. A petition for hearing by the Supreme Court of California filed by petitioners was denied on March 19, 1958.

JURISDICTION

The technical jurisdictional requirements appear to be set forth adequately in the petition. It is to be observed, however, that petitioners' contentions were rejected by the courts of the State of California based upon and in conformity with the pertinent decisions of this Court.

QUESTIONS PRESENTED

1. Is the authority of an administrative agency to "investigate" constitutionally limited by the agency's authority to "regulate"?

2. Does an inquiry by the agency deny due process of law when the inquiry was authorized, relevant and necessary and petitioners were fully and fairly informed of the scope and nature of the inquiry?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 9 of Article XIII of the California Constitution, Chapter 256, California Statutes of 1955, Section 1831 of the California Revenue and Taxation Code and Section 15613 of the California Government Code are printed in Appendix A, *infra*.

STATEMENT

Petitioner Redding Pine Mills Inc. (sometimes hereinafter referred to as "Redding"), is an Oregon corporation qualified to do business in California, and petitioner Robert B. Toogood is its secretary (Trial Court Finding I, Cl. Tr., p. 34, ll. 3-7). On or about

March 20, 1957, petitioner Toogood, as secretary of Redding, was served with a subpoena duces tecum issued by the State Board of Equalization of the State of California (sometimes hereinafter referred to as the "Board"). (Trial Court Finding II, Cl. Tr., p. 34, ll. 9-14.)

Redding is a so-called "common property" taxpayer whose properties in Shasta County are subject to assessment by the assessor of that county and not by the board (Trial Court Finding III, Cl. Tr., p. 34, l. 16-p. 35, l. 8). The board refused to withdraw and quash the subpoena on demand of Redding and Toogood (Trial Court Finding IV, Cl. Tr., p. 35, ll. 10-13).

The board presently is making an appraisal survey in 16 counties of the State, including Shasta County, and a statistical survey in the remaining counties of the State to determine the relationship between the total value of land, improvements and tangible personal property entered upon the local assessment roll by the county assessor and the total market value thereof to enable the board to perform the duties required of it by Section 9 of Article XIII of the California Constitution (Trial Court Finding V, Cl. Tr., p. 35, ll. 15-24). In its appraisal surveys, and as a basis for its determination, the board is required to consider sales and other appraisal data compiled by appraisers employed by it competent to ascertain accurately the market value of the property. Such data relate to representative samples of property subject to local assessment in each county sufficient

in number and dispersion to assure an adequate sampling of the taxable wealth within the county, both as to the classes of property enumerated and as to the location thereof (Trial Court Finding V, Cl. Tr., p. 35, l. 25-p. 36, l. 8).

The board is not investigating the accuracy of assessments made by county assessors but is performing an investigative and fact-gathering function for the purpose of intercounty equalization as required by the Constitution and statutes of the State of California (Trial Court Finding VI, Cl. Tr., p. 36, ll. 12-19). The properties of Redding and other persons were selected for appraisal through a system of random stratified sampling. To determine in each county the relationship between the total value of land, improvements and tangible personal property entered upon the local assessment roll by the county assessor and the total market value thereof, it is necessary that adequate and competent appraisals be made of the selected properties. Inspection of the books and records of the owners is necessary for the appraisal by the Board of certain types of property, and the property of Redding is of this type. Inspection of the books and records of Redding was requested by the Board for this purpose, and because the books and records requested were withheld by Redding, a subpoena duces tecum was issued requiring the production of the books and records in order that the appraisal might be made (Trial Court Finding VI, Cl. Tr., p. 36, l. 19-p. 37, l. 13).

The function of intercounty equalization, which is the constitutional and statutory duty of the board, is an integral part of the property tax process in the State of California, which begins with the assessment made by county assessors on property owned by "common property" taxpayers. Thereafter the county board of supervisors sitting as a county board of equalization is required to equalize the assessments within the county. Finally, the State Board of Equalization is required to equalize the local assessment rolls of the various counties of the State (Trial Court Finding VIII, Cl. Tr., p. 38, ll. 14-24).

The trial court concluded (on a petition for writ of mandate to quash the subpoena duces tecum) that the State Board of Equalization had authority to issue and properly issued its subpoena duces tecum to the petitioners requiring them to produce the books and records of Redding for inspection and examination in furtherance of the intercounty equalization function of the State Board of Equalization. It ruled, accordingly, that the petition for writ of mandate should be dismissed and the peremptory writ sought should be denied.

The District Court of Appeal affirmed the judgment of the trial court (Appendix A of Petition) and the Supreme Court of California denied a hearing.

ARGUMENT

I. The Courts of California Have Held That the Subpoena Was Within the Constitutional and Statutory Authority of the State Board of Equalization and No Substantial Federal Question Is Presented

The State Board of Equalization is established by Section 9 of Article XIII of the California Constitution, which provides in part:

> "A State Board of Equalization * * * shall be elected * * * whose duty it shall be to equalize the valuation of the taxable property in the several counties of the State for the purposes of taxation.
>
> "* * * The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; provided, such state and county boards of equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe as to county assessments, and under such rules of notice as the state board may prescribe as to the action of the state board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll; * * *."

It is thus apparent that the people of the State of California have imposed the duty of intercounty equalization on the State Board of Equalization. This

duty obviously cannot be performed unless and until the board has information upon which it can act.

Moreover, in 1949, the California Legislature enacted Chapter 1466, Statutes of 1949, which set forth detailed procedures for the State Board of Equalization to follow in performing the intercounty equalization function. Although the operation of Chapter 1466 was postponed in part, an important portion of the legislation presently is operative.

Thus, Chapter 256, Statutes of 1955, is a specific legislative directive to the board, providing in part:

> "The provisions of Sections 1 to 27, inclusive, of this act [Chapter 1466, Statutes of 1949] shall take effect on September 2, 1950, to the end that they shall be operative for the first time with respect to assessments made as of the first Monday in March, 1957, and taxes levied and funds allocated on the basis thereof. *Meanwhile, when funds are available for that purpose, the State Board of Equalization shall proceed with surveys in the manner directed by Section 1831 of the Revenue and Taxation Code, as added by this act, to assure completion of a survey pursuant to that section with respect to each county by the second Monday in July, 1957.*" (Emphasis added.)

It is necessary, accordingly, to refer to Section 1831 of the Revenue and Taxation Code, as added by Chapter 1466, Statutes of 1949, which section presently is effective and operative. Section 1831 provides:

> "To enable the board to perform its duties under this article and Sections 9 and 14 of Article XIII

of the State Constitution, the board shall make a survey annually in each county to determine the relationship between the total value of land, improvements and tangible personal property entered upon the roll by the assessor, and the total market value thereof. As a basis for this determination, the board shall consider sales and other appraisal data compiled by appraisers competent to determine accurately the market value of the property. These data shall relate to representative samples of property subject to local assessment in each county sufficient in number and dispersion to assure an adequate cross-section of the taxable wealth within the county, both as to the classes of property enumerated and as to the location thereof."

The intercounty equalization program thus enjoined on the State Board of Equalization by the California Constitution and the statutes is all that the board is seeking to follow here, and no more. Clearly, the board cannot operate in a vacuum—it must have information to perform its duties.

Properties in each county are selected by the board for appraisal through a system of random stratified sampling, and that is how petitioners' properties were selected. When petitioners declined to allow the board's appraisers to examine their books and records for the limited purposes outlined herein, there was no alternative left to the board other than for it to issue a subpoena. This the board has done under the general power granted it by the Legislature in Section 15613

of the California Government Code, which provides as follows:

> "The board may issue subpenas for the attendance of witnesses or the production of books, records, accounts, and papers before it, its secretary, any of its members, or any representative designated by it. Such subpenas shall be signed by a member of the board or its secretary, and may be served by any person."

The California courts have held that the subpoena issued by the State Board of Equalization was substantively proper based upon the constitutional mandate of the people and the statutory directives of the Legislature. The use of the subpoena by the board, as authorized by Section 15613 of the Government Code, clearly was necessary in order that the duties so required of the board could be performed.

Petitioners do not and in this Court could not question that substantive functions relating to intercounty equalization are imposed on the board by the California Constitution and the statutes. Rather, their contentions are based on a fallacious concept of the due process clause.

II. The Authority of an Administrative Agency to "Investigate" Is Not Constitutionally Limited by the Agency's Authority to "Regulate"

The parties are agreed that the subpoena was issued by the board in furtherance of an "investigatory" function and not an "adjudicatory" function. From this, however, petitioners assert that the board may

not "investigate" the affairs of a common property taxpayer because it does not have powers of regulation with respect to such taxpayers.

Petitioners' contentions are based on a misapprehension of the facts and authorities which appear to be no longer the law.

First, intercounty equalization is but the last step in a chain of events which begin with the assessment made by a county assessor against an individual taxpayer. This is followed by intracounty equalization by the county board of supervisors sitting as the county board of equalization. Finally, the State Board of Equalization is required to equalize the assessment rolls as between the counties of the State.

There can be no uniformity or equality in the application of the property tax as required by the Constitution (Section 1, Article XIII) unless each link of the chain is sound. Thus, it can be said (and the trial court concluded) that the State Board of Equalization does "regulate" the property tax imposed on all taxpayers in this State. Petitioners' basic premise, accordingly, is fallacious.

Even if it is assumed *arguendo* that the State Board of Equalization does not "regulate" the affairs of "common property" taxpayers, nevertheless the subpoena here was within the authority of the board. Petitioners' arguments to the contrary are based on authorities which appear to be no longer the law. Thus, petitioners cite the cases of *Ellis* v. *Interstate Commerce Commission* (1915) 237 U. S. 434, and *Jones* v. *Securities and Exchange Commission* (1936) 298 U. S.

1, for the proposition that the power of investigation is limited by the power of regulation.

As to whether the power to "regulate" limits the power to "investigate," petitioners have failed to recognize that in 1937 this Court held that the Illinois Commerce Commission could require production of records and reports from a foreign corporation which was engaged in interstate commerce and beyond the commission's regulatory power (*Natural Gas Pipeline Co.* v. *Slattery* (1937) 302 U. S. 300). In 1940, this Court denied certiorari after a lower court specifically rejected the contention that a subpoena for records must be limited to employees who were not exempt from the Wage Hour Act (*Fleming* v. *Montgomery Ward & Co.* (7th C. C. A., 1940) 114 F. 2d 384, 392, cert. den. (1940) 311 U. S. 690).

In sustaining the constitutionality of the Wage Hour Act in 1941, relating to interstate business, this Court upheld a requirement that certain records of wages and hours be kept. The Court remarked that "The requirement for records even of the intrastate transaction is an appropriate means to the legitimate end." (*United States* v. *Darby* (1941), 312 U. S. 100, 125.)

In 1943, this Court held that a district court must enforce a subpoena duces tecum at the instance of an administrative agency even in the absence of a showing that the company whose records were sought was subject to the regulatory jurisdiction of the agency (*Endicott Johnson Corp.* v. *Perkins* (1943) 317 U. S. 501). And in 1946, this Court made clear

that an administrative subpoena duces tecum will be judicially enforced if "the investigation be for a lawfully authorized purpose, within the power of Congress to command"; this applies not only to adjudications and to investigations relating to law enforcement but also to "general or statistical investigations authorized by Congress" (*Oklahoma Press Pub. Co.* v. *Walling* (1946) 327 U. S. 186, 209).

Perhaps the most pertinent indication of the present state of the law is the summary reversal by this Court of *Crafts* v. *Federal Trade Commission* (C. A. 9th, 1947) 244 F. 2d 282, on October 8, 1957 (2 L. Ed. 2d (Adv.) 23).

It is to be remembered that by constitutional mandate of the people and by the statutory directives of the Legislature, the investigation here involved has been authorized. It must follow, based on the authorities cited, that there are no due process impediments to the issuance of the subpoena even if it be assumed that the State Board of Equalization does not "regulate" with respect to common property taxpayers such as Redding.

III. Petitioners Were Fairly Informed of the Scope of the Inquiry and Their Rights Were Fully Protected

Petitioners' reliance on *Watkins* v. *United States* (1957) 354 U. S. 178, also is misplaced.

Entirely apart from the fact that the *Watkins* case involved constitutional questions relating to the First, Fourth and Fifth Amendments which are not pre-

sented here, the factual situation is completely different from that presented in the *Watkins* case. A mere reading of the subpoena (Petition, pp. 5-7) and the specific statutory directions of the Legislature as set forth in Section 1831 of the Revenue and Taxation Code (as added by Chapter 1466, Statutes of 1949) fully and fairly informed petitioners of the scope and nature of the board's inquiry. It was simply to ascertain the "market value" of petitioners' property and no more.

Moreover, petitioners' assertion that there is no way for a person to test the validity of a subpoena but that he "must produce the books and records or not produce them, at his peril" (Petition, p. 14) is completely unfounded. This mandamus proceeding to quash the subpoena was brought by petitioners for that very reason, i.e., to test the validity of the subpoena.

In truth, petitioners had ample opportunity to object to the inquiry here and its scope on the grounds of relevancy in the trial court and failed to do so. To the contrary, the trial court found, as the District Court of Appeal held, that the inquiry was relevant and necessary if the constitutional and statutory inter-county equalization duties of the State Board of Equalization were to be performed adequately and competently.

The California courts properly concluded that petitioners' contention was without merit.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

EDMUND G. BROWN, Attorney General
of the State of California

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Assistant Attorney General

IRVING H. PERLUSS,
Assistant Attorney General

Counsel for Respondents

APPENDIX "A"

California Constitution, Section 9, Article XIII:

A State Board of Equalization, consisting of one member from each congressional district in this State, as the same existed in eighteen hundred and seventy-nine, shall be elected by the qualified electors of their respective districts, at the general election to be held in the year one thousand eight hundred and eighty-six, and at each gubernatorial election thereafter, whose term of office shall be for four years; whose duty it shall be to equalize the valuation of the taxable property in the several counties of the State for the purposes of taxation. The Controller of State shall be ex officio a member of the board. The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; provided, such state and county boards of equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe as to county assessments, and under such rules of notice as the state board may prescribe as to the action of the state board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll; provided, that no board of equalization shall raise any mortgage, deed of trust, contract, or other obligation by which a debt is secured, money, or solvent credits, above its face value. The present State Board of

Equalization shall continue in office until their successors, as herein provided for, shall be elected and shall qualify. The Legislature shall have power to redistrict the State into four districts as nearly equal in population as practical, and to provide for the elections of members of said board of equalization.

Chapter 256, California Statutes of 1955:

The provisions of Sections 1 to 27, inclusive, of this act [Chapter 1466, Statutes of 1949] shall take effect on September 2, 1950, to the end that they shall be operative for the first time with respect to assessments made as of the first Monday in March, 1957, and taxes levied and funds allocated on the basis thereof. Meanwhile, when funds are available for that purpose, the State Board of Equalization shall proceed with surveys in the manner directed by Section 1831 of the Revenue and Taxation Code, as added by this act, to assure completion of a survey pursuant to that section with respect to each county by the second Monday in July, 1957.

Section 1831, California Revenue and Taxation Code:

To enable the board to perform its duties under this article and Sections 9 and 14 of Article XIII of the State Constitution, the board shall make a survey annually in each county to determine the relationship between the total value of land, improvements and tangible personal property entered upon the roll by the assessor, and the total market value thereof. As a basis for this determination, the board shall consider sales and other appraisal data compiled by appraisers competent to determine accurately the market value of the property. These data shall relate to representative samples of property subject to local assessment in

each county sufficient in number and dispersion to assure an adequate cross-section of the taxable wealth within the county, both as to the classes of property enumerated and as to the location thereof.

Section 15613, California Government Code:

The board may issue subpenas for the attendance of witnesses or the production of books, records, accounts, and papers before it, its secretary, any of its members, or any representative designated by it. Such subpenas shall be signed by a member of the board or its secretary, and may be served by any person.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. [redacted] 109

REDDING PINE MILLS, INC., a corporation, and ROBERT B. TOOGOOD,
Petitioners,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, DIXWELL L. PIERCE, Secretary of the State Board of Equalization of the State of California, and RAYMOND R. SCHULZE,
Respondents.

PETITIONERS' REPLY BRIEF.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 1075

REDDING PINE MILLS, INC., a corporation, and ROBERT B. TOOGOOD,
Petitioners,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, DIXWELL L. PIERCE, Secretary of the State Board of Equalization of the State of California, and RAYMOND R. SCHULZE,
Respondents.

PETITIONERS' REPLY BRIEF.

Pursuant to Rule 24(4) petitioners deem it desirable to file a brief reply to the brief of the respondent, State Board of Equalization of the State of California, in the above matter, in order to point up the

fallacy in the decision of the District Court of Appeal, and to point out the irrelevancy of the argument made by respondent in reply to petitioners' petition.

The decision of the Third District Court of Appeal of the State of California, which is the subject of review here, contains a falsely erroneous statement of both fact and law at page v of Appendix A to the petition and opening brief of petitioners. After stating a rule that has to do with the general "adjudicative" powers of administrative bodies, to the effect that they may be given subpoena powers and compel the attendance of witnesses in investigations, which proposition is not disputed by anyone connected with this case, the court then goes on to state as follows: "It has been so held, even where the person subpoenaed was not subject to regulation." *State ex rel. Railroad & Warehouse Com. v. Mees,* 235 Minn. 42 (49 N.W. 2d 386, 27 A.L.R. 2d 1197, 1206-1207).

Herein lies the error which we have attempted to have reviewed by the Supreme Court of the State of California and which we now contend must be rectified by a decision of this Court. The *Mees* case was *not an investigation.* The *Mees* case did not decide that a person not subject to regulation was subject to subpoena in an *investigation* or in an *"investigative" proceeding.* The *Mees* case arose out of a rate fixing hearing by the Public Utilities Commission of Minnesota. The witness was called to give testimony connected with the "adjudication" to be made by the Commission in that case. This complete distortion and misstatement of the rule and the nature of the

Mees case is the basic error in the entire decision of the court.

On page 11 of respondent's brief, respondent has again cited various authorities which deal with what petitioners refer to as "adjudicative" powers of administrative agencies, as distinguished from their "investigative" powers.

Respondent has cited the case of *Natural Gas Pipeline Co. v. Slattery* (1937), 302 U.S. 300. This case was dealt with at length on pages 15, 16 and 17 of the brief of petitioners before the Third District Court of Appeal. That case did not even involve an investigation. The case was a rate fixing proceeding before the Public Utilities Commission of the State of Illinois. The issue in that case was whether or not the pipe line company was subject to regulation by the Commission. The court held that it was. In the instant case it is conceded that the petitioners are not subject to regulation and that the proceeding in question was not an "adjudicative" proceeding.

The same is true of *Fleming v. Montgomery Ward & Co.*, which is a so-called "coverage" case. Montgomery Ward & Co. was held, in that case, to be subject to regulation by the Wage and Hour Administrator. In our briefs in the lower court, we have discussed at length the cases of *United States v. Darby* (1941), 312 U.S. 100; *Endicott Johnson Corp. v. Perkins* (1943), 317 U.S. 501; *Oklahoma Press Pub. Co. v. Walling* (1946), 327 U.S. 186, and *Crafts v. Federal Trade Commission* (C.A. 9th 1957), 244 F. 2d 882, reversed (Oct. 8, 1957), 2 L. Ed. 2d (Adv.) 23.

All of these were "coverage" cases and distinguishable from this case. Each case was decided upon the principle that the defendant was subject to regulation or came within a class that was subject to regulation, and therefore, the administrative agency was entitled to deal with the particular person or corporation as one so subject. If the factual investigation subsequently determined that the party was not subject to regulation, then the matter could be handled by judicial review.

The important distinction between an "investigative" and an "adjudicative" proceeding has been generally ignored in all of the considerations of this case by the lower courts and by respondent. Respondent, on page 13, attempt to reply to the argument of petitioners based upon the *Watkins* case, and in doing so, engage in some strange sophistry. We heretofore have referred the court to Section 15614 of the *California Government Code*, which provides for an automatic contempt and civil penalty upon the failure to produce the books and records. Petitioners contend that there should be some more certain or definite proceeding, or initation thereof, by whatever instrument may be used, to permit the taxpayer to know why and for what purpose his books and records are to be used. None is stated in the subpoena. There is no resolution of the board; no petition or complaint stating the purpose of the ex parte hearing. Respondent contends that our right to a mandamus proceeding avoids the necessity of making the decision to produce or not to produce them at our peril. The unfortunate

thing is that the mandamus proceeding has been decided against petitioners and petitioners are now required to produce the books and records. They have no further information as to the nature of the proceeding in which they are to be produced, or the purposes for which they are to be used, than petitioners had before bringing the mandamus proceeding.

We have pointed out heretofore that Section 11500 of the *Government Code* contains (in the Administrative Procedure Act of the State of California) a provision permitting all such subpoenas issued by administrative agencies to be challenged by simple refusal and a resulting order to show cause before a court of original jurisdiction wherein these matters can be inquired into. No such provision is contained in Section 15613 or 15614 of the *Government Code of the State of California* under which the subpoena in question has been issued.

Petitioners seriously urge this court to consider the character of the subpoena in question and the fact that it has to do with "investigative" powers which should be subject to the greatest scrutiny and limitation under the American system. Furthermore, the action being sustained by the decision of the court below is an enlargement of that power, so as to include a person not subject to regulation, requiring such person to appear at an ex parte hearing, to produce evidence, without having any knowledge at all of the issues or the purpose of such hearing. As previously indicated, it is our firm conviction that the affirmance of such procedure as lawful will place the stamp of

approval upon police state methods never before considered possible under our system of government.

Dated, Redding, California,
September 6, 1958.

Respectfully submitted,
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